SUPREME COURT OF THE UNITED STATES.

No. 377.

WILLIAM C. PERVEAR, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

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UNITED STATES OF AMERICA, *ss:*

1 The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the Commonwealth of Massachusetts, plaintiff, and William C. Pervear, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said William C. Pervear, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this first Monday of December, in the year of our Lord one thousand eight hundred and sixty-five.

Writ issued Nov. 3d, 1866.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States.

Allowed by NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

2 CIRCUIT COURT OF THE UNITED STATES,
Massachusetts District, ss:

And now here the judges of the circuit court of the United States and for the said district make return of this writ by annexing hereto, and sending herewith, under the seal of the circuit court, a

true and attested copy of the record and process in the said suit within mentioned and of all proceedings therein.

In testimony whereof I, Edwin T. Nash, clerk pro tem. of said circuit court of the U. S. within and for the district of Massachusetts, have hereunto set my hand and the seal of said court this fourth day of December, A. D. 1866.

[SEAL.] EDWIN T. NASH, *Clerk pro tem.*

3 Know all men by these presents, that we, Thomas J. Pervear, of Stoneham, and Thomas Salmon, of Woburn, in the State of Massachusetts, are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of five hundred dollars, to be paid to the said Commonwealth of Massachusetts, its certain attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this third day of November, in the year of our Lord one thousand eight hundred and sixty-six. Whereas, lately, at a superior court of the Commonwealth of Massachusetts, in a suit depending in said court between the Commonwealth of Massachusetts, plaintiff, and William C. Pervear, defendant, judgment was rendered against the said William C. Pervear, and the said William C. Pervear having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next: Now the condition of the above obligation is such, that if the said William C. Pervear shall prosecute his said suit to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be null and void; else to remain in full force and virtue.

THOS. J. PERVEAR. [L. S.]
THOS. SALMON. [L. S.]

Signed, sealed and delivered in presence of—
JOHN G. STETSON.

Approved: NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

4 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, to wit:*

At the superior court begun and holden at Lowell, within and for the county of Middlesex, on the third Monday of October, in the year of our Lord one thousand eight hundred and sixty-six, the jurors for

the Commonwealth of Massachusetts on their oath present, that William C. Pervear, late resident of Woburn, in the said county of Middlesex, at said Woburn, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-six, and on divers other days and times between that day and the day of finding of this indictment, without then and on said other days and times there having any license, appointment, or authority first duly had and obtained according to law, to keep intoxicating liquors for sale, and without then and on said other days and times there having any license, appointment, or authority first duly had and obtained, according to law, to sell intoxicating liquors, did then and on said other days and times, at Woburn, aforesaid, keep and maintain a certain common nuisance, to wit, a tenement in said Woburn, then and on said other days and times there used for the illegal sale and illegal keeping of intoxicating liquors, to the great injury and common nuisance of all the peaceable citizens of said Commonwealth there residing, inhabiting and passing, against the peace and dignity of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

HENRY C. ROLFE,
Foreman of the Grand Jury.
I. S. MORSE,
District Attorney.

5 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

Superior court, criminal session, October term, 1866.

COMMONWEALTH OF MASSACHUSETTS
vs.
WILLIAM C. PERVEAR.

And the defendant comes and defends the wrong and injury when, &c., where, &c., and says that the said Commonwealth ought to be barred from having and maintaining their said indictment in this case, because he says that he had at the time and times mentioned in said indictment, and at all other times, full, complete, and perfect authority and license from the United States of America to do all the acts complained of in said indictment, which license was granted him under and by virtue of an act of Congress, and for which he paid, according to the laws of the United States, into the treasury of the United States the full sum of twenty-five dollars, and that he has actually paid in money a tariff or revenue duty and tax upon the same spirituous and intoxicating liquors to the government of the United States, for the keeping and selling of which he is complained of in said indictment, which duty, tariff, or tax was paid upon the said spirituous or intoxicating liquors in the same packages, and in the same form and quantity in which he sold the same, as charged in said indictment, and in no other form, or package, or quantity, and that he has done no other act, or sold any other spirituous or intoxicating liquors than such as he has paid a duty or tax upon to the government of the United States as aforesaid; all of which he is ready to verify.

And for further plea in his behalf, the said defendant says that the Commonwealth ought to be barred from having and maintaining their said indictment in this case, because he says that by the Constitution of the United States, and also by the constitution of this Commonwealth, it is provided that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; and that the acts of the legislature upon which the indictment is founded imposes fine and punishment for an act which is not wrong in itself, and which fine and punishment are excessive, cruel, and unusual, and the said act of the legislature is unconstitutional and void; all of which he is ready to verify.

Wherefore he prays that the said Commonwealth from having and maintaining their said indictment in this case may be barred, and that he may have judgment, and be hence discharged, &c.

WILLIAM C. PERVEAR.
By his attorneys, RICHARDSON & NORRIS.

Filed Oct. 23d, 1866.

Demurrer to plea in bar.

6 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

Superior court for the transaction of criminal business, Oct'r term, 1866.

COMMONWEALTH, by indictment, *vs.* WILLIAM C. PERVEAR. } No.

And now comes Isaac S. Morse, as he is district attorney for the northern district, and says that the Commonwealth aforesaid ought not to be barred from having and maintaining the said indictment against the said Pervear, defendant, as aforesaid, by reason of anything in the plea of said defendant alleged; because he says that the said plea and the matters therein contained are not sufficient in law to bar the Commonwealth from further prosecuting the said indictment against the said defendant. And the said district attorney, among other causes of demurrer, assigns the following, to wit, that said plea is double, argumentative, and otherwise informal and insufficient; all of which the said district attorney is ready to verify.

Wherefore, for want of sufficient plea in this behalf, the said district attorney prays for judgment for the Commonwealth, and that the said defendant may plead over to the said indictment.

I. S. MORSE,
District Attorney.

And the defendant joins in demurrer.
By his attorney

GEO. SENNOTT.

Filed Oct. 23d, 1866, and sustained and def't ord'd to plead over.

7 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

In superior court for criminal business, Lowell.

COM'TH, by indictment, *vs.* WILLIAM C. PERVEAR. } October term, Nov. 2d, 1866.

This was an indictment charging def't with keeping and maintaining a tenement in this county for the illegal sale and illegal keeping for sale of spirituous and intoxicating liquors, without license or authority therefor.

To the indictment defendant filed the special plea, in bar, annexed. To said plea the Com'th, by its att'y, demurred, and def't joined in demurrer; the court then overruled the plea and sustained the
8 demurrer against the objections of the defendant. The defendant was then set at the bar to be tried by a jury, on a plea of not guilty entered for him by order of court, s'd deft. refusing to plead other or further plea than special plea so overruled as aforesaid. And the court instructed the jury that the said special plea was no defence to the indictment. To all which rulings, overrulings, and proceedings the defendant respectfully excepted and prays his exceptions may be allowed.

The indictment, plea, demurrer, and joinder aforesaid are made part hereof and referred to.

W. M. C. PERVEAR.
By his att'y GEO. SENNOTT.

Filed Nov. 2d, 1866.

Examined and allowed.

MARCUS MORTON,
Judge of Superior Court.

9 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, to wit:*

To the sheriff of our county of Middlesex, his deputies, and the keeper of the house of correction in our county of Middlesex, greeting:

Whereas by the consideration of our superior court, begun and holden at Lowell, within and for the county of Middlesex, on the third Monday of October, in the year of our Lord one thousand eight hundred and sixty-six, William C. Pervear, late resident of Woburn, in said county, now in custody of our sheriff of our said county of Middlesex, convict of the crime of keeping a liquor nuisance on the sixteenth day of the session of the same court, being the second day of November, in the year of our Lord one thousand eight hundred and sixty-six, was sentenced by our said court to pay a fine of fifty dollars to the use of said Commonwealth, and the costs of his prosecution taxed at dollars and cents, and stand committed until this sentence be complied with, and to be confined to hard labor in and within the precincts of said house of cor-

rection for the term of three months, and to stand committed according to said sentence.

We, therefore, command you, the said sheriff and deputies, to remove the said William C. Pervear to said house of correction, and we command you, the keeper of said house of correction, to receive the said William C. Pervear, and the same William C. Pervear to imprison and employ in and within the precincts of said house of correction for and during the term of three months, and until he shall pay said fine and costs, or be otherwise discharged by due process of law.

And for so doing, this shall be your warrant. And you are to make return of this warrant, with your doings therein, to the office of the clerk of our said court, in Cambridge, as soon as may be.

Witness Charles Allen, esq., at Cambridge, this second day of November, in the year of our Lord eighteen hundred and sixty-six.

[L. S.] JNO. JAS. SAWYER, *Ass't Clerk.*

10 COMMONWEALTH OF MASSACHUSETTS, *Middlesex, ss:*

Superior court.—Oct'r term, 1866.

In testimony that the foregoing are true copies of all the papers filed and of record in the case Commonwealth of Massachusetts *vs.* William C. Pervear, I hereto set my hand and affix the seal of said court, this third day of November, in the year of our Lord one thousand eight hundred and sixty-six.

[L. S.] JNO. JAS. SAWYER, *Ass't Clerk.*

Liquor nuisance.—1,082.

COMMONWEALTH
vs.
WILLIAM C. PERVEAR.

SUPERIOR COURT, *Oct'r T.*, 1866.

6th d. Returned by the grand jury and filed in court.

JNO. JAS. SAWYER, *Ass't Clerk.*

Nov. 1, def't is arraigned and standing mute, the court order the plea of not guilty entered, and pt. jury is empanelled, to wit:

David M. Balfour, foreman, Asahel G. Bachelder, Thomas Betty, Jonas C. Butterfield, George S. Cheeney, Daniel Churchill, John Clark, 2d, Warren Clark, Thomas D. Coburn, Darius L. Fox, Walcott Richardson, William H. Richardson.

Nov. 1st.—Verd. guilty.

Nov. 2d.—Sentence, Fine $50 and costs, $, and H. of C. 3 mos.

O

Supreme Court of the United States.

No. 377.

WILLIAM C. PERVEAR,

Plaintiff in Error,

vs.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

This case comes to this Court under the twenty-fifth section of the Judiciary Act, on writ of error to the Superior Court of Massachusetts.

Two questions are fairly presented upon the record.

First. Whether the payment of a tax to the United States upon the spiritous liquors kept and sold by the plaintiff in error, authorized him to keep and sell them in violation of the statutes of Massachusetts.

Second. Whether the statutes of Massachusetts in this behalf are unconstitutional.

The Superior Court of Massachusetts answered both these questions in the negative, and they are now brought here for revision.

The first of these questions has already been substantially settled by this Court by its decisions upon cases of the same character.

This Court has determined that a license granted under the Internal Revenue Acts to sell liquor, confers no authority to make such sales in violation of state laws.

It has also decided that the fee paid for such a license is merely a tax and that its payment has no other effect than that of the payment of

It has also decided that the payment of a specific tax upon an occupation or business does not authorize the carrying on of such occupation or business, if prohibited by the statutes of a state.

McGuire *vs.* Commonwealth, 3 Wallace, 388.
United States *vs.* Vassar, 4 Wallace.

The only distinction which can be claimed to exist between these decided cases and the one under consideration is, that in the present case the tax paid was upon the article sold instead of upon the business carried on.

But it is respectfully submitted that, notwithstanding this distinction the rule established in the cases cited must apply to this case.

The power of the federal government to impose taxes upon property is unlimited, so long as the taxes, if of one class, are uniform, and if of the other class, are duly proportioned.

It has power to tax every article and every species of property.

The claim of the plaintiff in error, if sustained, would lead to the monstrous result that every article of property taxed by the general government would thereby be removed from state jurisdiction. The states would thereby lose the power to regulate or restrain in any way the use or the sale of any such article.

The state governments might be utterly destroyed.

See Commonwealth *vs.* Holbrook, 10 Allen (Mass.) 202.

As to the second question raised. This Court has already held that similar statutes of Massachusetts and of other states are constitutional.

The License cases, 5 Howard, 573, etc.

It is now said that the statutes in question are unconstitutional upon the ground that the punishments prescribed for their violation are cruel and unusual, etc.

The clause in the United States constitution forbidding such legislation, does not apply to the states, but limits the power of Congress only.

Barron *vs.* Baltimore, 7 Peters, 247.
Fox *vs.* Ohio, 5 Howard, 434, 435.
Barker *vs.* People, 3 Cowen, 686.
James *vs.* Commonwealth, 12 S. & R. 221.

If it is claimed that the constitution of Massachusetts also forbi such legislation, it is sufficient answer to say that our own courts ha settled that these statutes are not unconstitutional upon this ground.

Commonwealth *vs.* Hitchings, 5 Gray (Mass.) 483.

This Court, upon questions concerning the construction of state sta utes and constitutions, generally follows the decisions of the courts o such state.

M'Cutchen *vs.* Marshall, 8 Peters, 220.
State Bank of Ohio *vs.* Knoop, 16 Howard, 369.
Nesmith *vs.* Sheldon, 7 Howard, 812.

There are four other cases on the docket of this Court similar to th one under discussion. They are as follows:

No. 378. Lynde *vs.* Massachusetts.
No. 422. Salmon *vs.* Same.
No. 423. Cass *vs.* Same.
No. 424. Armstrong *vs.* Same.

No question is raised by either of these plaintiffs in error, which ha

3. *Imported articles*, so taxed, have been protected from State int ference by this Court because they were taxed by Congress to ra revenue.

4. Congress, in its Internal Revenue Acts, has now taxed dome

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No. 423. Cass *vs.* Same.
No. 424. Armstrong *vs.* Same.

No question is raised by either of these plaintiffs in error, which has not been discussed in this case.

It is now suggested to the Court that the record in each of these last named cases does not show that any question such as is prescribed by the twenty-fifth section of the Judiciary Act was passed upon by the state court of Massachusetts.

Inasmuch, however, as these cases must, at all events, fall if the one now argued falls, the counsel for the Commonwealth has no desire to argue, but merely suggests, the question of the jurisdiction of this Court in these cases last named.

CHESTER I. REED,
Attorney General of Massachusetts.

Decision of Ques[n] in 378, 422, 423, 424

1. No question and 25th Jud Act decided
Cases must off on question of pleading.
Should plea in bar
demurrer for Defendants - sheriff -
Dont understand -
Sup no ques[n] of constitutional law

Barron *vs.* Baltimore, 7 Peters, 247.
Fox *vs.* Ohio, 5 Howard, 434, 435.
Barker *vs.* People, 3 Cowen, 686.
James *vs.* Commonwealth, 12 S. & R. 221.

Supreme Court of the United States.

NO. 377.

WILLIAM C. PERVEAR, PLAINTIFF IN ERROR

vs.

COMMONWEALTH OF MASSACHUSETTS.

Plaintiff's Brief.

This case is here on a writ of error to the Superior Court of Massachusetts, under the twenty-fifth section of the Judiciary Act.

The questions presented are

1st. Does the payment of a tax to the United States by the plaintiff upon the liquors kept and sold by him, authorize him to keep these for sale or to sell them contrary to the laws of Massachusetts? The plaintiff contends that it does, and says:

1. Congress has power to lay and collect taxes, duties, imposts and excises in order to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be *uniform* throughout the United States.

2. Congress, in the exercise of this power, has constantly taxed *imported articles*.

3. *Imported articles*, so taxed, have been protected from State interference by this Court because they were taxed by Congress to raise revenue.

4. Congress, in its Internal Revenue Acts, has now taxed domest

5. Now, if the payment of the first impost protects imported brandy from State Laws, why does not the payment of the second impost protect the plaintiff's domestic liquor and beer?

6. Again, Chief Justice Marshall declares that, "by the payment of the duty to the United States, the importer PURCHASES a RIGHT to sell his merchandise, a State law to the contrary notwithstanding." Can this be true? If it is, and it means anything, why has not the plaintiff, by paying *his* duty, purchased a similar right to sell his goods, notwithstanding a State law?

Brown *vs.* Maryland, 12 Wheaton. 447
McCulloch *vs.* Maryland, 4 Wheaton.
Weston *vs.* City Counc. Charleston, 2 Peters, 449.
Story on Constitution (article *Tax*).

7. The objection that the State governments would be destroyed under the plaintiff's position, cannot be maintained. The utmost that could befall them from the fullest enforcement of this constitutional power of Congress would be, that they must mind their own business.

II.

CONSTITUTIONALITY OF THE MASSACHUSETTS LIQUOR LAW.

1st. These laws are contained in the 86th and 87th chapters of the General Statutes of Massachusetts, and in the following subsequent enactments.

Ch. 121, Statutes 1864, §§ 1 and 2.
Ch. 250, " "
Ch. 149, " 1865.
Ch. 223, " "
Ch. 280, " 1866.

2d. Inspection will show that they are sumptuary laws.

3d. Authorities show that they are enacted for a moral end, i. e. to

enforce temperance and general morality by direct legislative enac ment.

Com. *vs.* Clapp, 5 Gray, (Mass.) 97.
Com. *vs.* Hitchings, ib. (Mass.) 482.
Com. *vs.* Pomeroy, ib. (Mass.) 486 n.
Fisher *vs.* McGirr, 1 Gray, (Mass.) I.
License cases, 5 Howard, 504.

4th. Such an object is not a legitimate object of civil governmen and enactments to such an end are not within its constitutional powe The end of government is the protection of the persons and the pro erty of men, and not to enforce morality or to teach religion, or to carr on farming, or the lumber trade, or to monopolize the liquor traffic.

5th. Laws passed by Government, which it has no right to pass, a not laws.

6th. Punishments inflicted in pursuance of such laws are illegall inflicted.

Mill on Liberty, pp. 170–3.
Wm. Von Humboldt, Sphere and Duties of Government, p 171.
Rationale of Government and Legislation, Lord Wrottesly.

7th. If a State Government fines or imprisons an American citize to enforce morality *only*, the American Government owes him protecti against the State.

Constitution, Preamble, Amendments, Art. X.

8th. The Liquor Laws of Massachusetts are, as before state intended to enforce morality only.

9th. Congress cannot pass laws to enforce morality expressly, or f a moral end alone. It cannot aid a State to pass such laws eith directly or indirectly.

10th. This Court will examine and determine the constitutionality of any Act of Congress, or any part of one.

Marbury *vs.* Madison, 1 Cranch, 137.
1 Story, Constitution, § 373–391.
3 " " § 1570.
1 Kent, 449.

11th. But, if the general principle above enumerated is not sustained, we say,

Duties are laid to collect a revenue. When paid, they are *the revenue*, *i. e.* the means to carry out the powers of Congress. If the direct consequence of any State law is to *destroy* any part of those *means*, or even to interfere with their collection, can that law be constitutional? If it stood, could Congress ever execute its power?

1 Adams v Voze / Gray (Mass)

12th. This Court has plainly said, "The States have no power, by taxation or OTHERWISE, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the power vested in the General Government."

McCulloch *vs.* Maryland.
Weston *vs.* City Council Charlestown.

III.

POLICE POWER.

1. Public police and economy defined.

IV. Comm. ch. xiii. pp. 162, *et seq.*

2. What are the subjects of police power?

IV. Comm. ch. xiii.
Fisher *vs.* McGirr, 1 Gray.

3. The plaintiff avers, that at the times and places mentioned therein, he spirituous or intoxicating liquors charged to be kept for sale or sold by him, in their own nature, or in the manner in which the indict

charges that he kept them or sold them, were not articles offensive, no
ious, infectious, or dangerous to public health or to public safety, su
as poisons, putrid provisio..s, infected clothing, or gunpowder ar
That they are not subject to the provisions of any statute relating
purporting to relate to the public health. That they are not artic
the keeping, or exhibition, or sale of which is an offence against Pub
morality or public decency. That they are not charged to be so
the indictment. And that they are articles of regular commerce, a
were his personal property, and so were not subjects of the poli
power.

2

Geo. Sewall

Clfs Atty